# Supreme Court of the United States

OCTOBER TERM, 1907.

EDWARD S. THOMAS, LLOYD M. HOWELL and ASHBEL P. FITCH, Trustees in Bankruptcy of Jacob Berry and Harold L. Bennet, individually, and as Jacob Berry & Company,

Petitioners,

AGAINST

ANNA D. TAGGART, and others,

Respondents.

## BRIEF FOR RESPONDENT, ANNA D. TAGGART.

### Statement.

This case comes before the Court on a writ of certiorari issued to the Circuit Court of Appeals for the Second Circuit (p. 100) to review a decision of that Court affirming an order made October 23, 1905, by the District Court for the Southern District of New York directing the petitioners as Trustees in Bankruptcy of Jacob Berry & Company, among other things, to deliver to the respondent, Anna D. Taggart, certificate No. C15,546 for

fifty shares and certificate No. A30,563 for thirty-three shares of preferred stock of the United States Steel Corporation (pp. 38-40). These certificates of stock both stand in the name of Anna D. Taggart, and were delivered by her to Berry & Company on or about September 15, 1904 (pp. 59, 63; Exhibit A, p. 74). Berry & Company subsequently pledged the certificates, together with other securities, to the Hanover National Bank, as collateral to a loan. Upon the failure of Berry & Company on November 26, 1904, the bank sold the greater part of the securities, but not these two certificates, and after paying the loan with the proceeds of sale returned these two certificates, with the other unsold securities, to the trustees in bankruptcy (pp. 93, 94).

Mrs. Taggart was a customer of Berry & Company at the time of their failure, having maintained with them from January, 1903, an account for the purchase and sale of stocks and other securities on margin (pp. 57, 58). Upon the failure of Berry & Company on November 26, 1904, her account was closed out; that is to say, all the securities which Berry & Company had purchased and were then carrying for her account were entered in her account as sold at prices prevailing on November 26, 1904. The eighty-three shares of Steel preferred stock which Mrs. Taggart had delivered to Berry & Company were not entered as sold, but were entered as collateral security left on hand. The proceeds of the securities thus sold exceeded by $841.03 the amount which Mrs. Taggart would have been obliged to pay Berry & Co. before the sale in order to take up all the securities then held by Berry & Co. for her account. Accordingly, at the close of business on November 26, 1904, Mrs. Taggart had a credit balance of $841.03 and eighty-three shares of Steel preferred stock on hand as collateral. See statement of

Mrs. Taggart's account with Berry & Company from October 31 to November 26, 1904, marked "Exhibit B," and printed opposite page 74 of the record, which was furnished to her by the Trustees (p. 58). The word "call." after 83 U. S. S. Pfd. in the second and last lines is a misprint for "Coll.," meaning "collateral."

Subsequently, to wit, on January 30, 1905, Mrs. Taggart tendered to the Trustees the sum of $10,638.69, the amount which Mrs. Taggart would have been obliged to pay Berry & Co. before the sale of November 26 in order to take up all the securities then held by Berry & Co. for her account, with interest, and demanded the delivery to her of all said securities, both those which Berry & Company had purchased for her account and also the eighty-three shares of Steel preferred stock which she had delivered to Berry & Company. This tender and demand were refused by the Trustees (pp. 73-74).

The only question in this case is whether the transaction by which Mrs. Taggart delivered to Berry & Company the two certificates of Steel preferred stock on September 15th was a sale of the stock by Mrs. Taggart to Berry & Company, or merely a pledge of the stock to protect Berry & Company against losses which they might sustain through purchasing, selling or carrying securities for Mrs. Taggart's account; or, in other words, did Mrs. Taggart transfer to Berry & Company all her right, title and interest in the stock, or did she merely give them a lien on the stock for a certain purpose, retaining the general ownership, and the right to redeem the stock when the purpose of the lien had been accomplished? If the transaction was a pledge of the stock as security, then, unquestionably, the order of the District Court, and the decision of the Circuit Court of Appeals affirming said order, were correct, because Mrs. Taggart's

indebtedness to Berry & Company has been paid, the purpose of the pledge has been accomplished, and Berry & Company's lien has been satisfied and discharged. The Trustees, of course, have no greater or better right or interest in the stock than Berry & Company themselves had.

The circumstances under which Mrs. Taggart delivered the two certificates of steel preferred stock to Berry & Company are not stated fully or accurately in the Trustees' brief, the Trustees assuming, without justification, as we claim, that the nature of the transaction, like those under which the other respondents delivered securities to Berry & Company, is to be determined by the printed provisions of Exhibit C, the receipt given her for the stock. The circumstances, as shown by Mrs. Taggart's uncontradicted testimony, were as follows:

Berry & Company had their main office in the City of New York, and a branch office in Philadelphia (p. 16). The manager of the Philadelphia office was George M. Davis, through whom Mrs. Taggart had given most of her orders for the purchase and sale of stocks prior to September 14, 1904 (pp. 57, 61, 62). On that day, Berry & Company were not carrying any securities for her account, having sold on September 6th and 12th, respectively, the twenty shares of stock which they were carrying on September 1st (see statement of her account from September 1st to October 31st, 1904, marked "Exhibit A," and printed opposite page 74). The proceeds of the sale of these stocks exceeded by about $150 Mrs. Taggart's debit balance to Berry & Company, and gave her a credit balance (Exhibit A).

On or about September 14th, Mrs. Taggart being temporarily in New York City, called at the New York office of Berry & Company, apparently for the purpose of making some arrangement for further transactions, and had a

conversation with Mr. Coakley, manager of that office (p. 59). She stated to him that she would like to make some more money. He suggested that if she had some stock and would give it to Berry & Company they would make some money for her. She then told him that she had some steel shares, and he said, "Very well, we will try and make you a nice profit." He told her that if she would give them this stock it would be *just as safe in their possession* as it was in her box at the Pennsylvania Company, and that he would make her a nice lot of money. He told her that stocks were going up, and strongly advised her to put it in their hands, saying that *she could get it at any time;* that *she could have the shares at any time* (pp. 59, 60, 61, 64, 67, 68). He was so particular about it that he said: "Now have Mr. Davis go down to the bank with you and secure—take the certificates up with him,"—meaning that Mr. Davis would accompany her (p. 64). Mrs. Taggart took it for granted that Berry & Company would buy stocks for her. Coakley said that Davis would tell Mrs. Taggart the kind of stocks which would be likely to rise and that Davis would then buy them for her (p. 65).

Mrs. Taggart returned to Philadelphia that same day, and the very next day she went to her safe deposit box, took out the two certificates of steel preferred stock—one for fifty shares, numbered C15546, the other for thirty-three shares, numbered A30563—took them to the Philadelphia office of Berry & Company and delivered them to Mr. Davis (pp. 59, 60). In the meantime Coakley had telephoned over to Davis from New York, so that Davis knew that Mrs. Taggart had seen Coakley and was coming with the stock (p. 67). Davis asked Mrs. Taggart to sign her name on the back of the certificates, which she did (p. 66). Davis then went to his desk, took one of Berry & Com-

pany's printed forms of receipt, wrote Mrs. Taggart's name and a description of her stock, giving even the numbers of her certificates, in blank spaces left therefor, wrote across the printed matter on the face of the receipt the words, "As Collateral on Account," signed the receipt "George M. Davis, Manager," and then delivered it to Mrs. Taggart (p. 65, Exhibit C). This receipt is printed on page 76, but for a better understanding of the nature of the document we ask the Court to examine the original, which will be presented upon the argument.

Mrs. Taggart had no conversation with Davis about the purpose of the delivery of the stock (p. 67). Nothing was said, either in her interview with Coakley or in her interview with Davis, about the certificates being repledged, rehypothecated or loaned, or about their leaving the possession of Berry & Company for any purpose (pp. 59, 60, 67). Mrs. Taggart supposed that the stock would remain in Coakley's possession or that of the firm (p. 59).

Mrs. Taggart did not read the small printed matter on Exhibit C beginning with the words, "The same to be a general deposit," and ending with the words, "commodities are dealt in," until after the failure of Berry & Company (p. 60). She simply took it, folded it up and put it in her bag (p. 65). She noticed that it was signed and that it referred to her eighty-three shares of Steel preferred stock (p. 66). Beyond this, she had no knowledge of its contents until after the failure of Berry & Company (pp. 65-66). She accepted the receipt "the same as she would for a bill paid, or anything of the kind" (p. 60).

Berry & Company entered this transaction in Mrs. Taggart's account under date of September 15th as "83 U. S. S. Pfd. Recd." without crediting Mrs. Taggart with any particular amount of cash, as they did in the case of a sale of securities or a

deposit of cash as margin (see Exhibit A, 5th line, opposite p. 74).

On subsequent occasions, to wit, on October 31st, November 25th and November 26th, Berry & Company entered this stock in her account as "83 U. S. S. Pfd. Coll.," thus expressly distinguishing it from twenty other shares of U. S. Steel Preferred which they had bought and were carrying for Mrs. Taggart's account (Exhibit B. The word "call" after "83 U. S. S. Pfd. is a misprint for "Coll.," meaning collateral).

After delivering her eighty-three shares of steel preferred stock to Berry & Company, Mrs. Taggart, upon the suggestion and advice of Coakley or Davis, gave Berry & Company further orders for the purchase and sale of stocks for her account, without furnishing any further securities or cash as margin (pp. 68, 69, Exhibit A).

Mrs. Taggart received from time to time through the mail, from Berry & Company, bought and sold notices which were made out on printed forms, advising her of the amount and description of stock bought or sold for her account, the price paid or received, etc. These notices contained printed matter somewhat similar to, but not identical with the printed matter on Exhibit C (pp. 70-71). Mrs. Taggart never read any of the printed matter on these notices and never had any knowledge of their contents until after the failure of Berry & Company (pp. 71-72).

The trustees argue in substance:

1. That Exhibit C was delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company and that by the provisions of that document the transaction was a sale of the stock and not a pledge as collateral security.

2. That Mrs. Taggart delivered the Steel stock to Berry & Company as margin *in lieu of cash;*

that the stock should be treated the same as cash would be treated, and that as the title to cash passes on payment, so also the title to this stock passed on delivery.

3. That Berry & Co. actually applied the Steel stock *as cash* to the purchase of securities for Mrs. Taggart's account.

4. That the relation between Mrs. Taggart and Berry & Company, with reference to the securities purchased and carried on margin, was debtor and creditor, Berry & Company being the owner of the securities; that the same relation exists, with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company, and that Berry & Company became the owners of the stock on delivery.

5. That it is contrary to the spirit of the Bankruptcy Act and operates as a preference to permit Mrs. Taggart, who delivered stock as margin, to recover all, when the other customers, who delivered cash as margin, can recover only a dividend as general creditors.

We shall argue:

1. That Exhibit C was not delivered or accepted as a contract governing the delivery of the Steel stock to Berry & Company; that the contract governing this delivery was made with Coakley in New York and that under that contract the transaction was not a sale but merely a pledge as collateral security.

2. That even if Exhibit C had been delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company, still, under the provisions of that document, the transaction was not a sale but merely a pledge as collateral security.

3. That Mrs. Taggart did not deliver her Steel

stock to Berry & Company under such circumstances that it must be treated the same as cash and that Berry & Co. never treated it *as cash* or applied it to the purchase of securities for Mrs. Taggart's account.

4. That it makes no difference whether the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was debtor and creditor or pledgor and pledgee, there being no reason to hold that the same relation must exist with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company.

5. That the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was pledgor and pledgee, and not debtor and creditor.

6. That the redelivery of the Steel stock to Mrs. Taggart is not contrary to the spirit of the Bankruptcy Act and is not a preference.

## POINT I.

**Exhibit C was not delivered or accepted as a contract governing the delivery of the Steel stock to Berry & Company. The contract governing this delivery was made with Coakley in New York. Under that contract the transaction was not a sale but merely a pledge as collateral security.**

The substance of the arrangement made by Mrs. Taggart with Coakley in the conversation at the New York office was that she should deliver to Berry & Company her Steel stock, that Berry &

Company would purchase, carry and sell securities for her account, and by giving her "tips" when and what to buy and sell, they would make some more money for her; that in the meantime they would keep her stock *safely in their possession,* and if the subsequent transactions were profitable, ultimately return to her the identical certificates received. Upon this much of the arrangement there seems to have been a clear understanding between the parties. Mrs. Taggart confidently expected that her subsequent transactions would be profitable, and she accordingly "never dreamed of her eighty-three shares being touched at all" (p. 69). She apparently did not consider what would happen to her eighty-three shares if the transactions were unprofitable. Coakley, however, intended, and under the circumstances had reasonable ground to believe, that Mrs. Taggart intended Berry & Company to look to this Steel stock for their indemnification in case her subsequent transactions were unprofitable. It is clear, however, that neither Mrs. Taggart nor Coakley intended that all her right, title and interest in the Steel stock should pass to Berry & Company. All Coakley wanted was to induce Mrs. Taggart to continue her transactions and to obtain for Berry & Company security against loss.

In the ordinary case of a deposit by a customer of securities as margin, Berry & Company wished to obtain the rights to repledge, rehypothecate, loan, substitute and sell without notice on approximate exhaustion of margin, but Coakley, in order to overcome Mrs. Taggart's timidity in delivering her property to them, evidently intended to make this a special case by agreeing to keep her stock safely in Berry & Company's possession and ultimately give back to her the identical certificates received, in case her subsequent transactions were profitable.

If Mrs. Taggart had then and there taken the certificates from her pocket and delivered them to Coakley, with or without obtaining a receipt for the same, there can be no doubt that the transactio would have been a plain and simple case of a common law pledge of personal property to protect the pledgee against loss and that the rights of the parties would have been nothing more or less than those of pledgor and pledgee at common law. When Mrs. Taggart left his office there remained nothing for her to do but to get her certificates in Philadelphia and deliver them to Davis at the Philadelphia office. She would then be in a position to continue her transactions, and, as she hoped, make some more money.

When we bear in mind the arrangement made in New York and that Mrs. Taggart delivered her certificates to Davis, and Davis gave her Exhibit C the *very next day*, without a word as to the purpose of the delivery, without a word of inquiry or comment on either side, and that Coakley had notified Davis by telephone that he had seen Mrs. Taggart in New York and that she was coming to deliver the stock, the inference is irresistible that the stock was delivered and received in Philadelphia in pursuance of the arrangement made in New York; that Mrs. Taggart had no intention or desire to change in any way the arrangement she had made with Coakley, and that Davis had no intention or desire of making any *new* arrangement with Mrs. Taggart, but that he was acting merely under instructions from his home office. In other words, Exhibit C was given and accepted *as a receipt* for the stock as collateral security and not as a contract.

This view is confirmed by the fact that Davis *substantially changed* Berry & Company's printed form of receipt by writing across the face of the paper, in ink, the words "As collat-

eral on account." Why should he have done this unless instructed by Coakley to receive the stock merely "as collateral on account"? If Berry & Company had desired or expected in this case, as in the ordinary case of a delivery of securities as margin, to acquire the rights to repledge, rehypothecate, loan, substitute and sell without notice on approximate exhaustion of margin, why should Davis have made this change in the receipt? We must attribute some purpose to his act. He used the regular form of receipt but changed it so as to suit this case, which he evidently regarded as a special case different from the ordinary case of a delivery of margin by a customer.

The words written in ink across the face of the paper are most important in determining the nature of the instrument. They are deemed to show the final intention of the parties and by well-settled rules of law supersede and prevail over the printed matter in the interpretation of the instrument.

*Hagan* v. *Scottish Ins. Co.*, 186 U. S., 423.

*Kratzenstein* v. *Western Assurance Co.*, 116 N. Y., 54, 57.

In the first case cited, Mr. Justice Peckham in interpreting an insurance policy, applied (pp. 428, 429)

> "the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract beween the parties. * * * If there be any inconsistency between the written provision of the policy and the printed portion thereof, the written language must prevail."

In the second case cited, the Court of Appeals of New York stated the rule as follows:

> "Where a contract contains two repugnant provisions, the one printed and the

other written, it is well settled that the latter must control the interpretation of the instrument, as it is presumed to express the latest intention of the parties."

It is clear, beyond question, that Mrs. Taggart had no idea of making any arrangement or contract with Davis changing in any way the arrangement she had made with Coakley. Even if Davis had delivered Exhibit C to her as a contract with the desire of committing her to its provisions, his purpose was not accomplished. Her attention was not called to any of the provisions of the document. She did not read any of them at the time or afterwards, until after the failure of Berry & Company. She had no reason to expect that Davis would give her any document except a simple receipt for her stock, pursuant to the arrangement made with Coakley. As an intention to contract is essential to the making of a valid contract, and mere silence is not, except under extraordinary circumstances, sufficient to indicate such an intention, it is clear that she did not become committed to any provisions of Exhibit C as a contract. A person receiving, without knowledge of the contents, a document purporting to be a contract does not become bound by its provisions unless he knew or had reason to suppose that the document was offered as a contract.

*Springer* v. *Westcott*, 166 N. Y., 117.
*Bostwick* v. *B. & O. R. R.*, 45 N. Y., 712.
*Bosoian* v. *Hubbard*, 121 App. Div., 510 (Second Department, October, 1907).

In *Springer* v. *Westcott* (*supra*) the defendant's agent took from the plaintiff, a woman, the check of her trunk, with instructions to deliver the trunk at a certain address, and gave her a printed form

of receipt, which she immediately folded up and placed in her pocket, without reading. The receipt contained a limitation of defendant's liability. In an action for the value of goods lost out of the trunk, the trial Judge charged as follows:

> "If, however, you find from all the circumstances that the plaintiff did not know the paper writing in question was proffered as a contract, and received it not knowing its contents and satisfied it was given her simply to enable her to trace her property, or a mere receipt, then the plaintiff is not bound by its limitation, and you may, if you find she is entitled to recover, render a verdict in her favor for the value of the goods which you find were lost."

The Court of Appeals affirmed a judgment entered upon a verdict for the plaintiff, holding that the foregoing charge was a correct statement of the law.

In *Bosoian* v. *Hubbard* (*supra*) the plaintiff, an Armenian who was uneducated and could read with difficulty, maintained an account with the defendants who were cotton brokers. Upon the opening of the account the defendants told the plaintiff what the margin and rate of brokerage would be, and assured him that they would not close out his account without calling on him for more margin. After each purchase or sale by the plaintiff, the defendants delivered to him a memorandum of the same, made out on a printed form, which contained a provision authorizing the defendants to close transactions when margins were running out, without further notice. Plaintiff never read any of the printed matter on these memorandum slips. It was held that the original contract, not to close out his account without calling on him for more margin, was not modified by

the delivery and acceptance of the printed purchase and sales memoranda. Woodward, *J.*, said:

> "No authority has been cited in support of this theory of modification, nor have I been able to find any. If it is sound, a party to a contract may modify it by giving repeated notices of his 'modification' to the other party, provided the latter silently receives them, they being printed on slips carrying brief written memoranda made necessary by the nature of the contract. This can not be true, for there is no mutuality of agreement, which is as indispensable to the modification as well to the making of a contract."

It is clear that Mrs. Taggart accepted Exhibit C, upon which were written the number and description of her shares of stock and the exact numbers of the certificates delivered, merely as a receipt which would enable her subsequently to identify or trace her property.

## POINT II.

**Even if Exhibit C were delivered and accepted as a contract governing the delivery of the Steel stock to Berry & Company, still, under the provisions of that document, the transaction was not a sale but merely a pledge as collateral security.**

Inasmuch as the words, "As collateral on account," written in ink across the face of Exhibit C, supersede and prevail over all printed provisions which may be inconsistent therewith, it is really

unnecessary to consider the meaning of the printed provisions. If these provisons are consistent with a delivery of the stock as collateral security, they may be operative, but still the transaction was a pledge. If any of the printed provisions are inconsistent with a delivery as collateral security they are inoperative. See cases cited in preceding point. The written words are the best evidence of the intention of the parties and a convincing admission by Berry & Company of the nature of the transaction. This admission the Trustees cannot escape by any kind of argument. However, as the trustees have considered this case in their argument and in their brief as if the delivery of the stock were governed by the printed provisions of Exhibit C, without regard to the words written across the face of it, we will consider briefly the meaning and effect of these provisions.

The provisions of Exhibit C upon which the trustees rely for their argument—that the document imports a sale instead of a pledge—are those authorizing Berry & Company to repledge, rehypothecate or loan securities, and to substitute other similar securities therefor. These provisions, when properly construed, do not apply to securities *delivered by the customer* to Berry & Company as margin, but only to securities *purchased by Berry & Company* for the customer's account and held by them as margins or otherwise. The document provides that "in consideration of Jacob Berry & Company executing such orders for the purchase or sale of stocks, bonds, securities or commodities as may be given to them in writing, orally, by telegraph or telephone, the said Jacob Berry & Company may repledge, rehypothecate or loan any or all of *said* stocks, bonds, securities or commodities held by them on account thereof as margins or otherwise, and may substitute similar stocks, bonds, securities or commodities *therefor*." The word

"said" before the words "stocks, bonds, securities or commodities," shows that reference is made only to the stocks, bonds, securities or commodities *just previously referred to,* namely, those "purchased or sold" by Berry & Company pursuant to orders given "in writing, orally, by telegraph or telephone." The words "on account thereof" must mean on account of the purchase or sale of such stocks, bonds, securities or commodities. The words "held by them as margins or otherwise" makes the provision applicable only to the stocks, bonds, securities or commodities purchased or sold by Berry & Company *and held by them* as margins or otherwise on account of the purchase or sale of stocks, bonds, securities or commodities for the customer's account. The language contemplates that a customer may take up some of the stocks, bonds, securities or commodities purchased for his account by Berry & Company leaving others in Berry & Company's possession to be held by them as margin or otherwise on account of all the transactions. The provision for substitution clearly applies only to a substitution of similar stocks, bonds, securities or commodities for those *just previously referred to,* namely, those *purchased* or *sold* by Berry & Company and *held* by them as margins or otherwise. These provisions accordingly do not authorize Berry & Company to repledge, rehypothecate or loan any securities delivered to them by a customer as margin—such as the Steel stock delivered to them by Mrs. Taggart—or to substitute similar securities therefor. (See opinion of Circuit Court of Appeals, per Wallace, *C. J.*, pp. 97-98.)

Even if these provisions did apply to securities delivered to Berry & Company by a customer, they do not necessarily show that the transaction between the customer and Berry & Company was a sale rather than a pledge. The use of the words "*re*pledge and *re*hypothecate" indicates that the

transaction under which Berry & Company obtained the securities was a pledge or hypothecation. The authority extends to a pledge or hypothecation only for the purpose of raising money to replace that applied by Berry & Company to the purchase of securities for the customer's account. It would be an extreme construction to hold otherwise, as there is no reason why a customer should give Berry & Company power to pledge his securities in order to raise money for other customers or for Berry & Company's own purposes.

The power to repledge or loan securities or to substitute other securities therefor is not inconsistent with a pledge. A pledgee may well desire such powers for convenience in holding the pledged securities or to render them more useful and valuable to him as collateral, and a pledgor may of course confer such powers, without transferring to the pledgee all his right, title and interest in the securities.

If the securities were loaned or repledged, the right of the pledgee to recover or redeem the securities from the loan or pledge would take the place of the securities themselves and become the *res* of the pledge. Similarly, if the pledgee substituted other securities therefor, the substituted securities would take the place of the original securities as the *res* of the pledge. So long as the original securities are held by the pledgee they must be deemed the *res* of the pledge. The power to substitute does not include power to dispose of the securities *without substituting* others therefor. Such disposition of the securities would, of course, be in direct contravention of the power of substitution.

The difference between a bailment and sale is well understood. If the property delivered is ultimately to be returned in the same or a different form, or if its product or proceeds are to be returned, then the transaction is a bailment. It is

only when something other than the property delivered or its product or proceeds may be returned that the transaction becomes a sale.

*Powder Co.* v. *Burkhart*, 97 U. S., 110, 116.

*Sturm* v. *Boker*, 150 U. S., 312, 329, 330.

*Mallory* v. *Willis*, 4 N. Y., 76 (distinguishing *Horton* v. *Woodruff*, 2 N. Y., 153, on the ground above stated).

*Stewart* v. *Stone*, 127 N. Y., 500.

*Sattler* v. *Hallock*, 160 N. Y., 291.

The case of *Ogden* v. *Lathrop*, 65 N. Y., 158, did not involve the relation existing between a broker and customer. The decision merely holds that when one party gives property to another party with power to "use, transfer or hypothecate the same," he cannot hold the other party liable for a conversion, if he disposes of the property pursuant to the power given. There was no occasion to determine any question of title to the property.

The provision in the latter part of Exhibit C—that Berry & Company "may, without notice, upon the approximate exhaustion of margins, sell or buy, as the case may be, any stocks, bonds, securities or commodities, bought or sold or held by them as collateral or margin or otherwise"—is of course no indication of a sale rather than a pledge.

On the contrary, it indicates a pledge because it shows that Berry & Company were to *hold* the securities *as collateral* or *margin* and were *not* to sell until "approximate exhaustion of margin."

The provisions contained in the first paragraph of Exhibit C relate only to the securities delivered by the customer to Berry & Company. They provide specifically that Berry & Company may hold the securities "as mar-

gin and as *security* for, or *apply* the same in part payment of, or on account of, *losses* on any or all transactions in the purchase or sale of stocks, bonds, securities or commodities made for the customer's account." There is nothing magic or obscure about the word "margin." It means here nothing more than "security." Figuratively speaking, the margin is the difference between the value of the securities held by the broker and the amount which the customer must pay in order to obtain them. In a concrete or literal sense, margin means cash or any security which the customer may give the broker to protect him against loss on the customer's transactions. If the customer gives cash as margin, he reduces *pro tanto* the amount which he must pay in order to obtain the securities held by the broker for his account. If he gives securities as margin, he increases *pro tanto* the value of the securities held by the broker for his account. In either case, the effect is to increase the figurative margin.

See

*Hopkins* v. *O'Kane*, 169 Pa., 479.
*Taylor's Estate*, 192 Pa., 304.

The provisions authorize Berry & Company to apply the deposit "in part payment of, or on account of, *losses* on transactions" for the customer's account. The argument of the trustees that it authorizes the application of the deposit to the payment of the purchase price of securities purchased for the customer's account, is little short of ridiculous. The language cannot reasonably be construed to have this meaning. They argue that it authorizes application of the deposit "in part payment of * * * transactions in the purchase or sale of stock." This would certainly be an unusual form of expression. That Berry & Company never in fact made any such application of the securities,

is pointed out under Point III. The provisions in the first paragraph of Exhibit C, when properly construed, are affirmative indications that the securities deposited were to be held by Berry & Company merely "as security" and not as their own property.

If the printed provisions of Exhibit C, when taken together, gave to Berry & Company all the rights in and powers over the deposited securities which an absolute owner would have, there might be some ground for the trustees' argument that the effect of a delivery under this document was to make Berry & Company the owner of the securities. But such is not the case. Each right or power conferred is limited in its scope. The power to apply the securities is limited to an application to losses on transactions for the customer's account. The power to substitute is limited to the substitution of similar securities. The power to sell, without notice, is limited, both in time and place. The power cannot be exercised until the customer's margin is approximately exhausted, nor at any place, except certain enumerated stock exchanges. If Berry & Company became the absolute owner of the securities, they would, of course, have the right to apply the same to any purpose, substitute for the same any securities, whether similar or dissimilar, and to sell, without notice, to anybody, at any time and at any place. How can any person, whose powers over and rights in property are so limited, be deemed the owner? The bare fact that these rights and powers are specifically mentioned shows that Berry & Company was not intended to become the owner. No person of any intelligence would have worded a document as this one is worded if he intended it to have the effect of making Berry & Company the owner of securities delivered under it.

## POINT III.

**Mrs. Taggart did not deliver her Steel stock to Berry & Company under such circumstances that it must be treated the same as cash. Berry & Company never treated the stock as cash and never applied it to the purchase of securities for Mrs. Taggart's account.**

There is no evidence whatever to sustain the absurd contention made by the trustees that Mrs. Taggart delivered the Steel stock to Berry & Company under such circumstances that it would have been treated the same as cash paid as margin. They say that because Mrs. Taggart did not pay cash, but did deposit securities, therefore the securities must be treated the same as cash. The trustees do not seem to see the difference between securities and cash. If one man is indebted to another, he can extinguish the debt by the payment of cash, but cannot extinguish it by the delivery of securities, even of a much greater value than the amount of the debt, unless the creditor agrees to accept them *as* payment. The question of how they are received depends upon the intention of the parties.

Berry & Company had no idea of treating, and did not treat Mrs. Taggart's Steel stock as cash. They entered it in her account as "83 U. S. S. Pfd. Recd." on the day when it was received, and on subsequent days entered it as stock on hand or as collateral. If they had received the stock as cash they would have credited Mrs. Taggart with the amount of cash as which it was received, and they would not have had any occasion to mention the stock again in the account.

The fact that Berry & Company entered Mrs. Taggart's 83 shares of steel preferred stock in her account on November 26th, 1904, the day of the failure, as collateral left on hand, is conclusive evidence that Berry & Company never applied this stock to the purchase of any securities for Mrs. Taggart's account. If they had made any such application of the stock, they would have made it at the time when they purchased securities for her account and would have credited her with the amount of cash as which it was applied. The last securities purchased for her account were purchased on October 26th, almost a month prior to the pledge of the securities to the Hanover National Bank, as part of the collateral to the loan for $45,000 made by Berry & Company on November 25th. It is ridiculous to supose that this loan was made for the purpose of raising money to pay for stock bought for Mrs. Taggart a month previous. Furthermore, the pledge of the stock as collateral to a loan could not be held an application of the stock to the purchase of securities for her account. The trustees' argument immediately invites the questions, how much of the 83 shares of stock were applied to the purchase of securities for Mrs. Taggart's account, how much credit she thereby became entitled to receive from Berry & Company, and when was the application made. There is no evidence in the case to answer any of these questions. If such an application had been made, the stock would no longer be in Berry & Company's possession. The fact that it was left in their possession, or, rather, came subsequently into the trustees' possession as the successors to Berry & Company, is conclusive against such an application.

## POINT IV.

**It makes no difference whether the relation between Mrs. Taggart and Berry & Company, with reference to securities purchased and carried on margin, was debtor and creditor or pledgor or pledgee, there being no reason to hold that the same relation must exist, with reference to the Steel stock delivered by Mrs. Taggart to Berry & Company.**

If the relation between a customer and broker, with reference to securities purchased and carried on margin, is pledgor and pledgee, as held by the courts of New York and almost every other State, the customer is indebted to the broker in the amount advanced by the broker in the purchase of securities for his account. The title to the securities purchased is in the customer. The broker holds them as security for the repayment to him of the customer's indebtedness. If the relation is that of debtor and creditor, as held the courts of Massachusetts, the title to the securities is in the broker, and he holds them subject to an obligation to deliver them to the customer upon payment to him by the customer of a certain amount of money, and the customer is under obligation to pay to the broker this amount of money and take up his securities. It is the ordinary relation existing between the vendor and vendee of personal property under an executory contract of sale. Either party may require the other to perform upon reasonable notice.

Under either rule there are securities in the possession of the broker and there is an amount of money payable by the customer. If the value of the securities depreciates and becomes less than the

amount payable by the customer, then the broker runs a risk of loss, if the customer is not financially responsible. The risk which results to the broker from a depreciation in value of the securities is exactly the same under the Massachusetts rule as under the New York rule. In order that the broker may be protected against this risk, it is proper for him to demand, and for the customer to give, some form of security. When securities are delivered by the customer to the broker as margin, the purpose is merely to protect the broker against this risk, and the nature of the transaction, whether a pledge or a sale, must be determined by the intention of the parties. If the parties intend the transaction to be a pledge there is no reason why the law should step in and say that it cannot be a pledge and must be a sale. Also if the parties intend the transaction to be a sale, as, for instance, that the securities should be accepted and treated the same as a certain amount of money,—the law should of course give effect to the intention. The technical relation between the broker and customer with respect to the securities purchased and carried for the customer's account has no bearing whatever upon their intention with respect to securities delivered by the customer to the broker, and there is no question here of choice of law between the Massachusetts and New York rules.

We contend, for the reasons given in the preceding points, that the intention of the parties in the present case, whether gathered from the oral conversation between Mrs. Taggart and Coakley in New York or by the written or printed provisions of Exhibit C, was that the Steel stock should be delivered and received merely as security to protect Berry & Company against loss on transactions for Mrs. Taggart's account, and that accordingly the transaction must be deemed a pledge.

## POINT V.

**The relation between Mrs. Taggart and Berry & Company with reference to securities purchased and carried on margin, was pledgor and pledgee and not debtor and creditor.**

The relation between a broker and customer with reference to securities purchased and carried on margin should be determined by local law, that is, the law of the place where the transactions take place. The nature of this relation depends largely on the customs in the stock brokerage business. It would be most unfortunate if the relation between a broker and customer transacting business in New York pursuant to the customs of New York brokers should be considered that of pledgor and pledgee in the New York State courts but debtor and creditor in the Federal courts sitting in New York. The consequence of such a difference of law between two courts of concurrent jurisdiction upon a question which is the basis of transactions amounting to millions of dollars a day would most obviously be disastrous. See Burgess *v.* Seligman, 107 U. S., 20; Hiscock *v.* Varick Bank, 206 U. S., 28; *in re* Swift, 112 Fed. Rep., 375; Richardson *v.* Shaw, Opinion of Circuit Court of Appeals for Second Circuit, per Coxe, *J.*, 147 Fed., 658.

In New York and Pennsylvania, the two States in which Mrs. Taggart conducted her transactions with Berry & Company, it is held that the relation between a broker and customer with respect to securities purchased and carried on margin is pledgor and pledgee, that the customer is indebted to the broker to the amount advanced by the broker in the purchase of securities, and the

broker holds the securities purchased as security for the repayment of this indebtedness. The securities so purchased, the broker may repledge for the purpose of borrowing money to replace that advanced for the customer, but he must always hold the securities in such a manner that he or his customer can obtain possession of them upon tender or payment of the customer's indebtedness to the broker. The relation with respect to securities delivered by the customer to the broker as margin" is also pledgor and pledgee. The transaction is merely a pledge to secure the broker against loss on the customer's transactions, and when this purpose is accomplished the customer can recover his securities in specie from the broker or his trustee in bankruptcy.

Markham *v.* Jaudon, 41 N. Y., 235.
Baker *v.* Drake, 66 N. Y., 522.
Gruman *v.* Smith, 81 N. Y., 25.
Taussig *v.* Hart, 58 N. Y., 425.
Caswell *v.* Putnam, 120 N. Y., 153.
Horton *v.* Morgan, 19 N. Y., 170.
Stewart *v.* Drake, 46 N. Y., 449.
Stenton *v.* Jerome, 54 N. Y., 480.
Gillette *v.* Whiting, 120 N. Y., 402.
LeMarchant *v.* Moore, 150 N. Y., 209.
Content *v.* Banner, 184 N. Y., 121.
Kennedy *v.* Budd, 5 App. Div., 140, 143.
Tompkins *v.* Morton Trust Co., 91 A. D., 279, 280; aff'd without opinion, 181 N. Y.
Douglas *v.* Carpenter, 17 App. Div., 329.
Capron *v.* Thompson, 86 N. Y., 418.
Whitlock *v.* Seaboard Natl. Bank, 29 Misc., 85.
Rothschild *v.* Allen, 20 App. Div., 233; aff'd without opinion, 180 N. Y., 561.

Strickland *v.* Magoun, 119 App. Div., 113.
Gilpin *v.* Howell, 5 Pa., 41.
Wynkoop *v.* Seal, 64 Pa., 361.
Esser *v.* Linderman, 71 Pa., 76.
Hopkins *v.* O'Kane, 169 Pa., 478.
Van Horn *v.* Wilbough, 10 W. N. C., 347.

For fuller statement of New York law see report of Special Master (pp. 19-20).

The New York rule is adopted in every other jurisdiction where the question has arisen except alone Massachusetts.

Skiff *v.* Stoddard, 63 Conn., 198.
Brewster *v.* Van Liew, 119 Ill., 554.
Denton *v.* Jackson, 106 Ill., 433.
Cashman *v.* Root, 89 Cal., 373.
Richardson *v.* Shaw, 147 Fed., 659, C. C. A., 2nd Circuit.
*In re* Bolling, 147 Fed., 786, C. C. Va.
Leahy *v.* Lobdell, Farwell & Co., 80 Fed., 665, C. C. A., 6th Circuit.

The New York rule, we submit, is more sensible and practical than the Massachusetts rule and more in accordance with the conduct and presumed intention of the parties. There is no intention of either party to enter into such a contract as the Massachusetts courts imply; the transaction does not originate with the agreement by the broker to *carry* the securities for the customer. The carrying of the securities is not the essence of the transaction but is merely incidental to it. The transaction is ordinarily commenced

by the customer giving an order to the broker to purchase certain securities for his account at a certain price. The broker accepts the order and, we will presume, executes it. Up to this time nothing has been said by either party as to whether the customer is buying for speculation or for investment. The customer may not himself know; he buys the securities presumably because he thinks they are cheap or that they will rise in value. The broker asks no questions, but merely executes the order. After the order is executed, the broker ordinarily asks the customer whether he wishes to take up the securities and pay for them in full or whether he wishes the broker to carry them for him. If the customer takes up the securities and pays for them in full, that ends the transaction. If he asks the broker to carry the securities, he gives the broker either cash or other securities as margin.

Up to the time when the customer decides whether to take up the securities or to have the broker carry them, the relation is clearly that of principal and agent. The broker acts for the customer. The broker purchases the securities and the customer becomes indebted to him for the price. The indebtedness arises the very moment the purchase is made. Furthermore, as in any other case of principal and agent, the title to the securities purchased vests immediately in the customer. The broker doubtless has a right to hold the securities until the customer pays for them, and such a right is perfectly consistent with the title being in the customer. The customer having become indebted to the broker for the amount of the purchase price of the securities and the title to the securities having become vested in the customer, what is there to re-vest the title in the broker and change the customer's obligation to that of a purchaser under an executory contract of sale? What actually happens

is that the customer asks the broker to advance for him a part of the purchase price of the securities, and he leaves the securities in the broker's hands for the broker's protection. The substance of the transaction is exactly the same as if the broker delivered the securities to the customer and the customer paid for them in full and then the customer subsequently took the securities back to the broker and asked him to advance on their security a part of the price paid in their purchase.

The broker charges the customer with interest on the money advanced by him in the purchase of the securities in addition to commissions for his services as broker, and he credits the customer with all interest, dividends and other profits derived from the securities. If the securities appreciate in value, the gain is the customer's gain; if they depreciate in value, the loss is the customer's loss. The securities are wholly subject to the direction of the customer with respect to sale or other disposition. The customer has the right at any time to obtain them upon tendering to the broker the amount advanced by the broker for him. Similarly, the broker has a right at any time to demand repayment of the advances made upon tendering the securities to the customer. All these rights are similar to those of a pledgor and pledgee of personal property.

The fact that the broker ordinarily holds the securities in his own name, and thus acquires the right to collect the interest on bonds and dividends on stock and to vote on the stock, has no bearing whatever upon the question of title. It is almost the universal custom of any pledgee of securities like stock or bonds to hold them in his own name. The pledgee thus acquires some greater rights and greater protection from his pledge.

We submit, therefore, that, whether the question be governed by the local law or by general law or by common sense and reason, it must be held that

the relation between Mrs. Taggart and Berry & Company, with respect to securities purchased and carried for her on margin, was pledgor and pledgee.

## POINT VI.

### The re-delivery of the Steel stock to Mrs. Taggart is not contrary to the spirit of the Bankruptcy Act and is not a preference.

If the Steel stock still belongs to Mrs. Taggart or if she has a right to redeem the same from the trustee, it is clear that the re-delivery of the stock to her is not contrary to the spirit of the Bankruptcy Act and is not a preference. The spirit of the Bankruptcy Act is to apply to the payment of the bankrupt's debts the bankrupt's property and nobody's else property, and to require the trustees in bankruptcy who accidentally get possession of property of persons other than the bankrupt to surrender it immediately to the real owners.

## POINT VII.

### The determination of the Circuit Court of Appeals for the Second Circuit should be affirmed and the writ of certiorari dismissed, with costs.

Respectfully submitted,

THOMAS THACHER,
GRAHAM SUMNER,
EDWIN M. LAWRENCE,
Counsel for Respondent Anna D. Taggart.